



The Comptroller General
of the United States

Washington, D.C. 20548

Silkowitz - PL II

Decision

Matter of: Genisco Technology Corporation
File: B-224201.2
Date: February 18, 1987

DIGEST

Protester is not entitled to the costs of filing and pursuing a protest, including attorney's fees, where it will have an opportunity to compete under the new solicitation that more accurately reflects the contracting activity's needs than the one canceled during the pendency of the protest.

DECISION

Genisco Technology Corporation seeks the recovery of the costs of filing and pursuing a protest against the award of a contract to Fairchild Weston Systems, Inc. under request for proposals (RFP) No. DAAB07-86-R-G227, issued by the U.S. Army Communications and Electronics Command. Genisco withdrew this protest after it was rendered academic when the agency terminated the protested contract for the convenience of the government, stating that it intended to revise the specifications and then resolicit. We therefore closed the file without action on November 20, 1986.

BACKGROUND

The subject solicitation, issued on May 30, 1986, was the first competitive procurement for a magnetic tape cartridge having the capability to record digital information at the density of 888 bits per inch on 9 tracks. Under this acquisition, the Army sought 13,218 of these magnetic tape cartridges and related items with a first article test requirement. The solicitation identified this item by reference to the part number and national stock number of a cartridge manufactured by Genisco and also referenced the drawing number of the cartridge case. The RFP also set forth

038074-132214

6 technical evaluation factors and 12 subfactors and required offerors to submit all information necessary to enable the contracting activity to properly evaluate proposals. Offerors were advised that technical acceptability would depend on an acceptable rating in each factor and subfactor. The solicitation further provided that award would be made to the responsible offeror submitting the lowest priced technically acceptable proposal and that the government reserved the right to award without discussions.

The Army received proposals from three firms: Graham Magnetic, Fairchild, and Genisco. Of the two proposals at issue, Fairchild's total price was \$6,736,489.06; and Genisco's was \$4,138,941 for one cartridge and \$6,974,029 for the cartridge identified in the solicitation. The agency found Genisco's proposals technically unacceptable and made award to Fairchild, without discussions, on September 16.

Genisco's September 24 protest to our Office followed. Genisco argued that both cartridges complied with the terms of the RFP and that rejection of its lower-priced product as unacceptable was therefore improper. In support of this position, Genisco stated that the particular drawing referenced in the RFP includes a specification that in turn references both of its cartridges.

After the protest record had been fully developed and a bid protest conference held, the Army decided to terminate the protested contract for convenience of the government, revise the specifications, and resolicit. Upon being apprised of the agency's position, Genisco agreed to withdraw its protest, reserving its claim for the cost of filing and pursuing it, including attorney's fees.

GENISCO'S CLAIM

Genisco recognizes that our decisions interpreting the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3554(c)(1) (Supp. III 1985), and our Bid Protest Regulations, 4 C.F.R. § 21.6(d) (1986), provide that the Comptroller General's authority to award the costs of pursuing a protest is predicated upon a determination by this Office that a solicitation, proposed award, or an award does not comply with a statute or regulation. Sabreliner Corp., B-221857, Apr. 29, 1986, 86-1 CPD ¶ 414; Monarch Painting Corp., B-220666.3, Apr. 23, 1986, 86-1 CPD ¶ 396. Since its protest was rendered academic by the agency's actions, Genisco realizes that its claim would be disallowed under

these decisions. Nevertheless, Genisco argues that in view of the "procedural obstacle course" it was forced to traverse because of the Army's failure to acknowledge and correct the solicitation deficiencies promptly, and in view of the purpose of CICA to establish a strong enforcement mechanism providing vendors wrongfully excluded from competition with equitable relief,^{1/} we should find Genisco entitled to costs in this case.

We cannot make such a finding here because we would not view Genisco as entitled to its protest costs even if we had made the necessary determination and sustained the protest. While our Bid Protest Regulations provide for the award of protest costs where the protester was unreasonably excluded from a procurement, unless we recommend award to the protester and the protester actually receives the award, 4 C.F.R.

§ 21.6(e), there are certain situations in which, although we sustain the protest, we do not view the protester as having been unreasonably excluded from the procurement. These situations generally involve circumstances where the protester's proposal will be reconsidered, Bendix Field Engineering Corp., B-219406, Oct. 31, 1985, 85-2 CPD ¶ 496 (source selection decision to be reconsidered), and where an award reflecting the agency's actual needs could not properly be made under the existing solicitation and the protester will have an opportunity to compete under a revised solicitation. The Hamilton Tool Co., B-218260.4, Aug. 6, 1985, 85-2 CPD ¶ 132; Federal Properties of R.I., Inc., B-218192.2, May 7, 1985, 85-1 CPD ¶ 508.

In Federal Properties, the agency rejected a proposal, even though it met all specification requirements, because of certain concerns that it could validly have but that were not identified in the solicitation. We recommend that the agency revise the solicitation to include all relevant evaluation criteria and permit the submission of revised proposals by all offerors. We denied protest costs, however, stating that

"where . . . the procurement problem basically concerns the agency's use of a deficient description of what it wants, and the protester is given an opportunity to compete for the award under a corrected solicitation, the recovery of . . . costs . . . [is] generally inappropriate."

We think that holding is applicable here. It appears, from the protester's submissions and the Army's decision to

^{1/} See H. Rep. No. 98-861, 98th Cong., 2d Sess. 1435 (1985).

terminate the contract it awarded and hold a recompetition under revised specifications, that the Genisco cartridges may have been consistent with the specifications but that the Army believes the specifications were deficient and in need of revision before an award properly may be made. Since Genisco will have an opportunity to compete under the revised specifications, it is not entitled to protest costs. See Environmental Tectonics Corp., B-224104.2, Nov. 17, 1986, 86-2 CPD ¶ 567.

Genisco's claim for the costs of pursuing its protest is denied.

Harry R. Van Cleve

Harry R. Van Cleve
General Counsel